

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Petition of Smith & Nephew, Inc. for)	CG Docket No. 02-278
Retroactive Waiver of)	
47 C.F.R. § 64.1200(a)(4)(iv))	CG Docket No. 05-338
)	

PETITION FOR RETROACTIVE WAIVER

I. INTRODUCTION

Pursuant to 47 C.F.R. § 1.3 and Paragraph 30 of the Federal Communications Commission’s (“FCC” or “the Commission”) Order, DG Docket Nos. 02-278 and 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (October 30, 2014) (the “October 2014 Order”), Petitioner Smith & Nephew, Inc.¹ (“S&N”) hereby requests that the Commission grant S&N a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules, for any and all facsimile advertisements sent by or on behalf of S&N, with the recipients’ prior express invitation or permission, but which might not have complied with the opt-out notice requirements for such facsimiles. See 47 C.F.R. § 64.1200(a)(4)(iv).

The October 2014 Order clarified that the opt-out notice requirement in the Telephone Consumer Protection Act (“TCPA”), set forth in 47 U.S.C. § 227(b)(1)(C) and 2(d) of the TCPA and in the Commission’s implementing regulation, 47 C.F.R. § 64.1200(a)(4)(iv), applied to solicited fax advertisements (i.e. fax advertisements sent with the recipient’s prior express invitation or permission) as well as unsolicited fax advertisements. In the October 2014 Order, however, the Commission granted a

¹ S&N is a Delaware corporation with its principal place of business at 1450 E. Brooks Road, Memphis, Tennessee 38116-1804.

retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) to several petitioners who were facing TCPA class action lawsuits alleging that they had violated the TCPA and Section 64.1200(a)(4)(iv) by failing to include sufficient opt-out language in advertising facsimiles. The Commission reasoned that due to the potential confusion regarding whether opt-out language was required on solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest. (October 2014 Order ¶¶ 26-28.) Furthermore, the Commission invited any “similarly-situated parties” to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes, within six (6) months of the entry of the October 2014 Order. (October 2014 Order ¶ 30.)

S&N is similarly-situated to the petitioners who were granted retroactive waivers in the October 2014 Order. Accordingly, S&N respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) for the same reasons cited by the Commission in the October 2014 Order.

II. BACKGROUND

S&N, a high-technology medical device company, develops, designs, manufactures, distributes, and sells medical products, equipment, and supplies to various medical facilities and customers throughout the country. In connection with this business, S&N sometimes provides important information about its products via facsimile to customers who have requested or consented to receipt of such communication.

S&N is a defendant in a putative TCPA class action lawsuit pending in the Western District of Tennessee. The lawsuit styled, Rhea Drugstore, Inc., individually and on behalf of all others similarly situated, v. Smith & Nephew, Inc., Case No. 2:15-cv-02060 (a copy of which is attached hereto as Exhibit A), alleges violations of the TCPA and seeks damages for

facsimile advertisements sent to Rhea Drugstore, Inc. (“Rhea Drug”) and purported class members that allegedly did not bear the requisite opt-out notice. The purported class in Rhea Drug’s lawsuit is not limited to persons or entities that allegedly received unsolicited facsimile advertisements. (Complaint, ¶ 15.) Instead, Rhea Drug’s lawsuit also seeks damages for any facsimile advertisements that were sent since January 23, 2011 to recipients who requested the faxes or provided prior express invitation or permission to S&N or its agents for the faxes. (Complaint, ¶ 15.)

III. ARGUMENT

The FCC should grant S&N a retroactive waiver for any and all facsimile advertisements previously sent by S&N or on S&N’s behalf, with the recipients’ express permission or invitation, but which did not contain the requisite opt-out notice required by the Commission. A waiver of the Commission’s rules may be granted for good cause shown, if (1) special circumstances warrant a deviation from the general rule, and (2) the waiver would better serve the public interest than would application of the rule. (October 2014 Order ¶ 23.)

As discussed in the Commission’s October 2014 Order, special circumstances, namely the confusing state of the regulatory environment, warrant deviation from the rule for solicited faxes, and the requested waiver will serve the public interest. The Commission acknowledged in its October 2014 Order that there was reasonable uncertainty and confusion surrounding the obligation of a facsimile advertisement sender to include opt-out notices on solicited faxes under the TCPA. The TCPA, as amended in 2005 by the *Junk Fax Prevention Act*, requires the sender of an unsolicited facsimile advertisement to provide specified notice and contact information on the fax in order to allow recipients to opt-out of

any future fax transmissions from the sender. See 47 U.S.C. § 227(b)(1)(C)(i). The Commission later amended its rules to incorporate the addition of the *Junk Fax Prevention Act* to the TCPA. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, Cg Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (“the Junk Fax Order”). Among other things, in the Junk Fax Order, the Commission adopted a rule that provided that a facsimile advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.” 47 C.F.R. § 64.1200(a)(4)(iv).

An “inconsistent footnote,” however, was contained in the Junk Fax Order, which stated that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” Junk Fax Order, 21 FCC Rcd at 3810, n. 154. As discussed by the Commission in its October 2014 Order, this inconsistency along with the lack of explicit notice of the Commission’s intent to create the opt-out requirement “caused confusion or misplaced confidence” regarding the applicability of the opt-out notice requirement for *solicited* facsimile advertisements. (October 2014 Order, ¶ 28.) The Commission also determined that “granting a retroactive waiver would serve the public interest,” because it would be “unjust or inequitable” to subject parties to “potentially substantial damages,” given the confusion and misplaced confidence about the rule’s applicability. (October 2014 Order, ¶¶ 27-28.)

Consequently, the Commission granted retroactive waivers of its opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by

its rules. (October 2014 Order, ¶ 29.) Furthermore, in the October 2014 Order, the Commission invited other similarly-situated parties to seek waivers such as those granted in the October 2014 Order, within six months of the date of the Order. (October 2014 Order ¶ 30.)

The findings of the Commission that led it to grant retroactive waivers to the original petitioners in the October 2014 Order apply with equal force to S&N. S&N is facing a class action lawsuit in which its alleged failure to comply with 47 C.F.R. § 64.1200(a)(4)(iv) has the potential to expose S&N to monetary damages. The Commission previously found that substantial confusion existed surrounding the opt-out requirements for *solicited* fax advertisements. Thus, for good cause shown, the Commission should likewise grant S&N, as a similarly-situated party, a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv), as applied to alleged advertising faxes sent to recipients who provided prior express invitation or permission for such faxes.

IV. CONCLUSION

For all of these reasons, S&N respectfully requests that the Commission grant it the same retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) that the Commission already has granted to other parties similarly-situated to S&N.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

RHEA DRUGSTORE, INC.,
individually and on behalf of
all others similarly situated,

PLAINTIFF,

v.

SMITH & NEPHEW, INC.,

DEFENDANT.

Case No. _____

Complaint – Class Action

JURY DEMAND

CLASS ACTION COMPLAINT

Plaintiff, Rhea Drugstore, Inc. (herein "Plaintiff"), on behalf of itself and all other similarly situated, brings this Complaint against Smith & Nephew, Inc. ("Defendant") for violations of the Telephone Consumer Protection Act. Plaintiff seeks certification of its claims against Defendant as a class action. In support thereof, Plaintiff states as follows:

INTRODUCTION

1. This case challenges Defendant's policy and practice of faxing unsolicited advertisements without providing an opt-out notice as required by law.
2. Congress enacted the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, to regulate the fast-growing expansion of the telemarketing industry. As is pertinent here, the TCPA and its implementing regulations prohibit persons within the United States from sending advertisements via fax without including a detailed notice that allows recipients to expeditiously opt out of receiving future solicitations.



3. Junk faxes disrupt recipients' peace, drain recipients' paper, ink, and toner, and cause recipients tangible damages. Junk faxes also cause recipients to waste valuable time retrieving and discerning the purpose of the faxes; prevent fax machines from receiving and sending authorized faxes; and cause undue wear and tear on recipients' fax machines. Plaintiff is a pharmacy that must use its fax machine to receive communications about medical patients. That purpose is impeded when Plaintiff's fax machine is invaded by junk faxes.

4. The TCPA provides a private right of action and statutory damages of \$500 per violation, which may be trebled when the violation is willful or knowing.

5. On behalf of itself and all others similarly situated, Plaintiff brings this case to recover damages for violations of the TCPA and to enjoin Defendant from future TCPA violations.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331.

7. Venue in this district is proper because this is the district in which Defendant resides.

PARTIES

8. Plaintiff, Rhea Drugstore, Inc., is a family-owned pharmacy located in Little Rock, Arkansas.

9. Defendant Smith & Nephew, Inc., is a medical-device company that is incorporated in Delaware and that has its principal place of business in Memphis,

Tennessee. It is the American subsidiary of Smith & Nephew PLC, which has its headquarters in London, England.

FACTS

10. On November 27, 2014, at 4:46 a.m., Defendant sent an unsolicited advertisement to Plaintiff's ink-and-paper facsimile machine. The advertisement describes the properties of a product called "Acticoat Dressings" and invites Plaintiff to request more information or a free sample. A copy of this facsimile is attached hereto and marked as Exhibit A.

11. On December 3, 2014, at 6:27 p.m., Defendant sent an unsolicited advertisement to Plaintiff's ink-and-paper facsimile machine. The advertisement describes the properties of products called "Iodosorb" and "Iodoflex" and invites Plaintiff to request more information or a free sample. A copy of this facsimile is attached hereto and marked as Exhibit B.

12. Exhibits A & B are exemplary of the junk faxes Defendant sends.

13. Defendant did not have Plaintiff's prior express invitation or permission to send advertisements to Plaintiff's fax machine.

14. By merely telling Plaintiff to "Call 1-800-761-8493 to opt out of future communications," Defendant's faxes lack an opt-out notice that complies with the TCPA.

CLASS ALLEGATIONS

15. In accordance with Fed. R. Civ. P. 23, Plaintiff brings this action under the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the following class of persons (the "Class"):

All persons and entities who hold telephone numbers that received a facsimile transmission from Defendant at any time from January 23, 2011, to present that 1) promotes Defendant's products and 2) lacks an opt-out notice compliant with the requirements of the TCPA.

16. Plaintiff reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is proper.

17. Excluded from the Class are Defendant, any parent, subsidiary, affiliate, or controlled person of Defendant, as well as the officers, directors, agents, servants, or employees of Defendant and the immediate family members of any such person. Also excluded are any judge who may preside over this case and any attorneys representing Plaintiff or the Class.

18. Numerosity [Fed. R. Civ. P. 23(a)(1)]. The class is so numerous that joinder is impractical. Upon information and belief, Defendant has sent illegal fax advertisements to hundreds if not thousands of other recipients.

19. Commonality [Fed. R. Civ. P. 23(a)(2)]. Common questions of law and fact apply to the claims of all Class members and include (but are not limited to) the following:

(a) Whether Defendant sent faxes advertising the commercial availability of property, goods, or services;

(b) The manner and method Defendant used to compile or obtain the list of fax numbers to which it sent Exhibits A & B and other fax advertisements;

(c) Whether Defendant faxed advertisements without first obtaining the recipient's prior express permission or invitation;

(d) Whether Defendant's advertisements contained the opt-out notice required by law;

(e) Whether Defendant sent the fax advertisements knowingly or willfully;

(f) Whether Defendant violated 47 U.S.C. § 227;

(g) Whether Plaintiff and the other members of the Class are entitled to statutory damages; and

(h) Whether the Court should award treble damages.

20. Typicality [Fed. R. Civ. P. 23(a)(3)]. Plaintiff's claims are typical of the claims of all Class members. Plaintiff received unsolicited fax advertisements from Defendant during the Class Period. Plaintiff makes the same claims that it makes for the Class members and seeks the same relief that it seeks for the Class members. Defendant has acted in the same manner toward Plaintiff and all the Class members.

21. Fair and Adequate Representation [Fed. R. Civ. P. 23(a)(4)]. Plaintiff will fairly and adequately represent and protect the interests of the Class. It is

interested in this matter, has no conflicts, and has retained experienced class counsel to represent the Class.

22. Predominance and Superiority [Fed. R. Civ. P. 23(b)(3)]. For the following reasons, common questions of law and fact predominate and a class action is superior to other methods of adjudication:

(a) Proof of Plaintiff's claims will also prove the claims of the Class without the need for separate or individualized proceedings;

(b) Evidence regarding defenses or any exceptions to liability that Defendant may assert will come from Defendant's records and will not require individualized or separate inquiries or proceedings;

(c) Defendant has acted and continues to act pursuant to common policies or practices in the same or similar manner with respect to all Class members;

(d) The amount likely to be recovered by individual Class members does not support individual litigation. A class action will permit a large number of relatively small claims involving virtually identical facts and legal issues to be resolved efficiently in one proceeding based on common proofs.

(e) This case is inherently well-suited to class treatment in that:

(i) Defendant identified persons or entities to receive its fax transmissions, and it is believed that Defendant's computer and business records will enable Plaintiff to readily identify class members and establish liability and damages;

(ii) Common proof can establish Defendant's liability and the damages owed to Plaintiff and the Class;

(iii) Statutory damages are provided for in the statute and are the same for all Class members and can be calculated in the same or a similar manner;

(iv) A class action will result in an orderly and expeditious administration of claims, and it will foster economies of time, effort, and expense;

(v) A class action will contribute to uniformity of decisions concerning Defendant's practices;

(vi) As a practical matter, the claims of the Class are likely to go unaddressed absent class certification.

CAUSE OF ACTION

**Violations of the Telephone Consumer Protection Act
47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4)**

23. The TCPA provides strict liability for sending fax advertisements in a manner that does not comply with the statute. Recipients of fax advertisements have a private right of action to seek an injunction or damages for violations of the TCPA and its implementing regulations. 47 U.S.C. § 227(b)(3).

24. The TCPA makes it unlawful to send any "unsolicited advertisement" via fax unless certain conditions are present. 47 U.S.C. § 227(b)(1)(C). "Unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person

without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5).

25. Unsolicited faxes are illegal if the sender and recipient do not have an "established business relationship." 47 U.S.C. § 227(b)(1)(C)(i). "Established business relationship" is defined as "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." 47 U.S.C. § 227(a)(2); 47 C.F.R. § 64.1200(f)(6).

26. Regardless of whether the sender and recipient have an established business relationship, and regardless of whether the fax is unsolicited, a faxed advertisement is illegal unless it includes an opt-out notice on its first page that complies with the TCPA's requirements. *See* 47 U.S.C. § 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(4)(iv). To comply with the law, an opt-out notice must (1) inform the recipient that the recipient may opt-out of receiving future faxes by contacting the sender; (2) provide both a domestic telephone number and a facsimile machine number—one of which must be cost-free—that the recipient may contact to opt out of future faxes; and (3) inform the recipient that the sender's failure to comply with an opt-out request within thirty days is a violation of law. *See* 47 U.S.C. § 227(b)(2)(D); 47 CFR § 64.1200(a)(4)(iii).

27. Defendant faxed unsolicited advertisements to Plaintiff that did not have compliant opt-out notices, in violation of 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4).

28. Defendant knew or should have known (a) that Plaintiff had not given express invitation or permission for Defendant to fax advertisements about its products; (b) that Defendant's faxes did not contain a compliant opt-out notice; and (c) that Exhibits A & B are advertisements.

29. Defendant's actions caused damage to Plaintiff and the Class members. Defendant's junk faxes caused Plaintiff and the Class members to lose paper, toner, and ink consumed in the printing of Defendant's faxes through Plaintiff's and the Class members' fax machines. Defendant's faxes cost Plaintiff and the Class members time that otherwise would have been spent on Plaintiff's and the Class members' business activities.

REQUEST FOR RELIEF

WHEREFORE Plaintiff, individually and on behalf of all others similarly situated, respectfully requests that this Court:

- a) determine that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure;
- b) award damages for each violation in the amount of actual monetary loss or \$500, whichever is greater, and treble those damages;
- c) enjoin Defendant from additional violations; and

d) grant such other legal and equitable relief as the Court may deem appropriate, including costs and attorney's fees.

JURY DEMAND

Plaintiff and the Class members hereby request a trial by jury.

Dated: January 23, 2015

Respectfully submitted,

/s/ John C. Williams
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Counsel for Plaintiff and Proposed Class

EXHIBIT A

Demand more from your silver dressings



Bactericidal activity: Only ACTICOAT Dressings are proven bactericidal against 360+ pathogens, including 188 strains of MRSA (*in vitro*).¹⁻⁴

Efficacy: In a comparative study, ACTICOAT Dressings showed a 60% resolution of the clinical signs of infection in 2 weeks.^{5*}

Cost savings: ACTICOAT Dressings have been shown to require 33% fewer dressing changes compared with other brands.^{6**}

Wound healing: ACTICOAT Dressings have been shown in a comparative cohort study with BiatainTM Ag, ComfeelTM Ag and AquacelTM Ag to reduce wound healing time, healing 2X more wounds in 8 weeks.^{6**}

For more information or to request a free sample† of ACTICOAT Dressings, call 1-800-761-8493 or email megan.cramer@smith-nephew.com.

Mention code: ACTICOAT 0614-F

Or fill out the form below and fax it to 1-800-761-8494.

Name: _____

Title: _____

Company: _____

Phone: _____

Email: _____

When is the best time to reach you? _____

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†Offer available only to participants who are not current purchasers of ACTICOAT. Qualified participants must not resell or otherwise seek reimbursement for their use of free samples. Free samples are limited to the first 100 qualified respondents.

*The International Consensus Panel determined a two week period can be used to assess the efficacy of silver dressings, as measured by wound improvement. **Comparative cohort study (n=75) in mixed chronic wounds.

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EXHIBIT B

Only IODOSORB and IODOFLEX prevent and disrupt mature biofilms (*in vitro*).¹



Bactericidal

Kills 103 isolates of MRSA and 101 strains of *P. aeruginosa* (*in vitro*), with broad spectrum antimicrobial activity up to 72 hours (*in vitro*).^{2,3}

Rapid and effective deslougher

Cleanses wound bed to prepare for effective healing. Aids in autolytic debridement by absorbing excess slough and debris.^{4,5}

Highly absorbent

Absorbs up to 6 times its own weight in wound exudate.^{6,7}

For more information or to request a free sample[†] of IODOSORB or IODOFLEX, call 800-761-8493, ext. 3483 or email scott.siskin@smith-nephew.com.

Mention offer code: IODOSORB FAX 5-14

Or fill out the form below and fax it to 1-800-761-8494

Name: _____

Title: _____

Company: _____

Phone: _____

Email: _____

When is the best time to reach you? _____

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[†]Offer available only to participants who are not current purchasers of IODOSORB or IODOFLEX. Qualified participants must not resell or otherwise seek reimbursement for their use of free samples. Free samples are limited to the first 100 qualified respondents.

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